In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 370

MAGNESIUM CASTING COMPANY,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Magnesium Casting Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinion Below

The Opinion of the Circuit Court is reported at —— F.2d ——. A copy of this opinion is appended hereto, Appendix A, infra.

Jurisdiction

The judgment was entered on May 21, 1970. The jurisdiction of the Court is invoked under 28 U.S.C.A. Sec. 1254.

Applicable Statutory Provisions

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.) (hereinafter called "the Act"), and of the Administrative Procedure Act (5 U.S.C. 557(c)) are set forth in Appendix F. infra.

Question Presented

Did the National Labor Relations Board err in finding that an employer violated Section 8(a)(5) of the Act when it refused to bargain with a newly-certified union, where the Board denied the employer's request for review of the regional director's unit determination in a representation proceeding on the grounds that the request did not raise substantial issues warranting review and the Board refused to make its own determination or give plenary review to the regional director's determination before entering an unfair labor practice order based on such determination, where Section 10(c) of the Act requires that the Board itself must determine if a party has committed an unfair labor practice?

Statement of the Case

Upon petition for certification of collective bargaining representative filed pursuant to Section 9(c) of the Act by the United Steelworkers of America, AFL-CIO, hereinafter called "the Union," a hearing was held on April 4, 8, 12 and 18, 1968, before a hearing officer designated by the

Regional Director for the First Region of the National Labor Relations Board, hereinafter called "the Board." At issue in the hearing was the exclusion of assistant foremen as supervisors, within the meaning of Section 2(11) of the Act.

Among the employees sought by the Employer to be excluded from the unit as assistant foremen was Ivory Scott, who the Employer alleged had illegally and actively participated in soliciting not only support for the Union amongst the employees, but also authorization cards for the Union in support of its efforts to obtain a sufficient showing of interest to support its representation petition.

The Regional Director in his Decision and Direction of Election, issued on May 2, 1968, determined that all but one assistant foreman, that exception *not* being Ivory Scott, were employees within the meaning of Section 2(3) of the Act and were not supervisors (A. 112).[1]

Pursuant to the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.67 (c)(d) (Appendix F. pp. 53-54), the Employer, on May 31, 1968, filed a request for review on the basis that the Regional Director's Decision that the three men, including Ivory Scott, were not supervisors was clearly erroneous on the record and such error prejudically affected the rights of the Employer (A. 120). The Board denied the request for review, stating it raised "no substantial issues warranting review" (A. 129), thus leaving the Regional Director's Decision as the only determination made on the merits of this crucial issue.

An election was held on June 21, 1968, in which a majority of those in the unit voted for the Union and the results were certified on October 11, 1968 (A. 133).

Again seeking to raise the issue of the assistant fore-

[1] "A" refers to the Appendix filed with the United States Court of Appeals for the First Circuit and certified by the clerk of that court to this Court.

men's exclusions as supervisors, especially in the case of Ivory Scott, the Employer declined to bargain with the Union.

On November 8, 1968, the General Counsel, on behalf of the Board, issued a Complaint against the Employer, alleging the Employer illegally refused to bargain (A. 140). The Employer answered, denying that the appropriate unit should include assistant foremen, alleging that the showing of interest obtained by the Union to support its petition was sufficiently tainted by solicitation on behalf of the Union by the Employer's supervisors so as to warrant dismissal of the petition and revocation of the Certification of Representative (A. 147).

Thereafter, on December 3, 1968, General Counsel without presenting any evidence moved for Summary Judgment. The Employer in its Reply to Show Cause Order, again raised the issue that the Regional Director erred in concluding the assistant foremen were not supervisors (A. 156-158). The Trial Examiner in his Decision issued January 28, 1969 (attached hereto as Appendix C) granted the Motion For Summary Judgment without permitting any opportunity for a hearing. On April 17, 1969, the Board issued its Decision and Order (attached hereto as Appendix B), affirming without comment the rulings, findings, conclusions and recommendations of the Trial Examiner. *At no point in the Trial Examiner's Decision or the Board's Decision and Order was an independent determination made concerning the appropriate bargaining unit.*

The Employer filed a Motion for Reconsideration on April 29, 1969 (attached hereto as Appendix D), on the basis that the Board's failure to review the record before the Regional Director in order to make its own decision as to whether or not the assistant foremen were supervisors within the meaning of the Act was unlawful, citing *Pepsi-Cola Buffalo Bottling Company* v. *NLRB*, 409 F.2d 676 (C.

A. 2, 1969), cert. denied, 396 U.S. 904. The Board denied the motion "as lacking merit" and stated that with "due deference" to the *Pepsi-Cola* decision, the Board "disagrees therewith and adheres to its previous position until such time as the Supreme Court of the United States rules otherwise" (attached hereto as Appendix E). As noted above, this Court denied certiorari in *Pepsi-Cola*.

Upon the Board's petition for enforcement, the United States Court of Appeals for the First Circuit, under the authority of Section 2112 of Title 28 of the United States Code enforced the Board's order. In so doing, the Court specifically disagreed with the Second Circuit's *Pepsi-Cola* decision and the Second Circuit's modification of *Pepsi-Cola* in *NLRB* v. *Olson Bodies, Inc.*, 420 F.2d 1187 (1970), and with the Fourth Circuit's decision agreeing with *Pepsi-Cola*, in *NLRB* v. *Clement-Blythe Companies*, 415 F.2d 78 (1969).

Reason for Granting the Writ

UNDER SECTION 10(c) OF THE NATIONAL LABOR RELATIONS ACT, THE BOARD IS REQUIRED TO REVIEW THE REGIONAL DIRECTOR'S FINDINGS OF FACT AND DECISION IN A REPRESENTATION PROCEEDING AND MAKE ITS OWN DETERMINATION IN AN UNFAIR LABOR PRACTICE PROCEEDING BEFORE DECIDING WHETHER OR NOT AN UNFAIR LABOR PRACTICE HAS BEEN COMMITTED.

The decision of the Court of Appeals condones a procedure prohibited by the specific language of Section 10(c) of the Act (Appendix F. pp. 49-50) by permitting a regional director's findings of fact and decision to be the basis for an unfair labor practice finding without any Board review of that decision or independent determination of the issues presented in the representation proceeding.

Section 10(c) of the Act specifically provides that the Board itself must determine if a party has committed an

unfair labor practice. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). Merely because the issue in a representation proceeding was ruled upon by the regional director did not relieve the Board of its statutory responsibility. Clearly if there had been no representation proceedings and the charges arose strictly out of an unfair labor practice charge, a full hearing on the issue would have been mandatory, with the Trial Examiner hearing the evidence and making his own findings of fact and conclusions of law based on the evidence introduced before him, with the Board, pursuant to Section 10(c), affording full review of such findings and conclusions.

The issue before the Court is whether Section 3(b) of the Act (Appendix F. p. 49), which provides the regional director with authority to rule in representation proceedings *only*, relieves the Board of its duty and responsibility to rule on all issues presented in unfair labor practice proceedings. The Courts of Appeals in the Second and Fourth Circuits in *Pepsi-Cola*, supra, and in *Clement-Blythe*, supra, respectively, have answered that question in the negative, while the First Circuit in the immediate case has answered in the affirmative. The question of whether or not a party is entitled to Board review in an unfair labor practice proceeding of a regional director's representation decision is of crucial importance to all parties to Board proceedings and the existing conflict results in conflicting Board practices determined according to the Circuit in which the case is pending. Furthermore, the conflict encourages "circuit hunting" in an effort to obtain jurisdiction in that circuit court which is most receptive to the particular party's posture in this matter.

Under Section 3(b) of the Act the Board may delegate to its regional director its powers "under Section 9 to determine the unit appropriate for the purpose of collective bargaining..." Discretionary review is permitted by the

Board under 29 C.F.R. 102.67(c) (Appendix F. pp. 53-54) for one or more of the following reasons:

> (1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from officially reported Board precedent.
> (2) That the Regional Director's Decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
> (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

Although the Employer filed a request for review based on (1) and (2) above, it was denied by the Board, which stated it "raised no substantial issues warranting review" (A. 129), thus leaving the Regional Director's Decision as the only determination on the issue. There is no evidence that the Trial Examiner and/or the Board reviewed the record since 29 C.F.R. 102.67 (d) (Appendix F. p. 54) states that the request for review must be a document "enabling the Board to rule on the basis of its contents without the necessity of recourse to the record." In fact, General Counsel for the Board has not even alleged such a review. It is this failure of the Board to perform its functions pursuant to Section 10(c) of the Act which the Employer respectfully submits is unlawful.

In *Pepsi-Cola*, supra, Judge Kaufman, in holding that the Board itself must decide whether an unfair labor practice has been committed, stated:

> In an unfair practice proceeding, the Board cannot

completely abdicate its responsibility to a Regional Director, a functionary whose appointment is not even subject to consideration by the Senate, as are those of the Board members.[5] Moreover, the Board's experience is particularly relevant and desirable in deciding complex issues relating to the appropriate bargaining unit before the potent sanctions arising from the finding of an unfair labor practice are invoked.[6] See *NLRB* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 41 (1947); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947).

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[5] "(A)nother risk is that subordinates will be less competent than agency heads, particularly where the superiors have been selected for their expertise in a certain field. In such a situation private parties have a strong claim to the personal attention of the agency heads." Note, Subdelegation by Federal Administrative Agencies, 12 Stan. L. Rev. 808, 812 (1960). Cf. *Porter* v. *Roach*, 69 F. Supp. 56 (D. Ore. 1946).

[6] But the Supreme Court has indicated that a court's deference to the Board is not limited to issues involving the Board's expertise but extends to situations such as this, where the decision rests on the common law of agency, a law which a court might apply as effectively as the Board, *NLRB* v. *United Insurance Co.*, 390 U.S. at 260.

The expertise of the Board members is the basis for their selection as agency heads. While Section 3(b) of the Act provides for the Regional Director's authority to rule in Section 9 proceedings, which are limited to representation proceedings, nowhere is the Board permitted to delegate its final authority in unfair labor practice proceedings which bear the possibility of findings of unfair practices and court enforceable remedial orders. Where an integral part of those unfair labor practice proceedings involves a representation matter, the litigants are entitled to the personal attention of the Board members and the reflection of their expertise, which Congress considered in approving their appointments. While Congress permitted regional

directors more discretion in representation proceedings, it also maintained the added insurance that the regional directors' decisions would be permitted review by the Board. See 2 NLRB Legislative History of the Labor-Management and Disclosure Act of 1959, 1811-12 (1959). By failing itself to determine the status of assistant foremen, including Ivory Scott, the Board has acted contrary to the explicit intent and direction of Congress in Section 10(c) of the Act and has deprived the Employer of its specific rights as a litigant under the Act. *Pepsi-Cola Buffalo Bottling Co.* v. *NLRB,* supra.

Although the Board argued in its brief to the First Circuit Court that the representation and unfair labor practice proceedings are "really one and a single trial of the representation issue is enough," relying on *Pittsburgh Plate Glass Co.* v. *NLRB,* 313 U.S. 146 (1941), it is clear not only from a reading of the Act, but also from the same case the Board cites that the Board in fact must make a determination of *its own* on the unit issue when it becomes a relevant issue in an unfair labor practice proceeding. Section 3(b) of the Act, which was a post-1941 amendment to the Act, permits the Board to delegate its power under Section 9 to a regional director in a representation matter *only.* The sole purpose of this delegation was to expedite the election process so as to determine matters affecting representation as promptly as possible. At the time of the *Pittsburgh Plate Glass* case, in 1941, the Section 3(b) delegation to the regional director of Section 9 powers did not exist, so no contemplation was made of an occasion when the Board would not rule on a unit issue in an unfair labor practice proceeding. In *Pittsburgh Plate Glass* the Board itself in fact did rule on the unit issue. Clearly the Board would not be required to rule twice on the same evidence on the unit issue. The Board *is* required to rule *at least once* on the unit issue!

The First Circuit Court states that Congress intended to expedite all case handling in representation and unfair labor practice proceedings by the Section 3(b) amendment. If so, why did Congress limit the regional director's authority to the Board's Section 9 representation powers? If the only issue in a refusal to bargain complaint was the unit issue, then the Court would be left with the duty to review only the Regional Director's determination, and not that of the Board, as so empowered in Sections 10(e) and 10(f) of the Act (Appendix F. pp. 50-52).

Furthermore, the procedure used by the Board in this case does not comply with the Administrative Procedure Act, 5 U.S.C. 557(c), which requires that:

> All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of —
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record. . . .

Nowhere in the record before this Court did the Board state its reasons or basis for making its findings or reaching its conclusions. The Board's only action was to say that the Employer's request for review in the representation proceedings raised "no substantial issues warranting review".

That this method of handling an unfair labor practice proceeding is proscribed was also stated by Circuit Judge Butzner in *NLRB* v. *Clement-Blythe Companies*, 415 F. 2d 78 (C.A. 4, 1969), at 81:

> When the Board rules that an employer has committed an unfair labor practice, the employer is entitled to know, and the Board is charged with the duty

> of stating the reasons why the Board concluded the facts showed a violation of the law, cf. *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 195 (1941); 2 Davis, Administrative Law Sec. 16.12 (1958). *No statutory exception to this rule exists because critical elements of the controversy were determined preliminarily by the Regional Director in the representation proceedings.* The Board, not the Regional Director, has the responsibility of deciding complaints of unfair labor practice. 29 U.S.C. Sec. 160(c). (emphasis added)

The Employer in its Motion for Reconsideration requested the Board not necessarily to conduct a de novo hearing, but in the absence of such, to review the record before the Regional Director and make its own decision. See *Clement-Blythe,* supra. The Board did not raise any argument in opposition to the Employer's demand, except to deny the motion "as lacking merit" and to state that with "due deference" to *Pepsi-Cola,* it disagrees with it and adheres to its official decision until the Supreme Court of the United States "rules otherwise" notwithstanding that the Supreme Court denied the Board's writ for certiorari, thus supporting the Employer's position.

In view of the conflict of the First Circuit Court with the Second and Fourth Circuit Courts on the important issues of the scope of a regional director's authority in determining unfair labor practice charges and the degree to which the Board may or may not delegate its authority to decide unfair labor practices to the regional director, this Court must ensure the orderly and proper administration of the Act by resolving these issues.[2]

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[2] We are informed by Counsel for Olson Bodies, Inc. that on June 9, 1970 they filed a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review 420 F. 2d 1187, which raises substantially the same issue as stated hereinabove. This Court may wish to consider the immediate case together with that case.

Conclusion

For the reasons set forth above, this Petition For A Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 7462.

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

v.

MAGNESIUM CASTING COMPANY,

RESPONDENT,

and

UNITED STEELWORKERS OF AMERICA,

INTERVENOR.

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before ALDRICH, *Chief Judge*,
COFFIN, *Circuit Judge*, and BOWNES,
District Judge.

Abigail Cooley Baskir, Attorney, with whom *Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Marshall F. Berman*, Attorney, were on brief, for petitioner.

Jerome H. Somers, with whom *Louis Chandler* and *Stoneman and Chandler* were on brief, for respondent.

May 21, 1970.

COFFIN, *Circuit Judge*. On the basis of the evidence adduced at a unit determination hearing on March 14, 1968, the Regional Director concluded that six of the seven assistant foremen whose status was in dispute were employees rather than supervisors and thus includible in the proposed bargaining unit at the Magnesium Casting Company plant in Hyde Park, Massachusetts. The Company's

Request for Review, contending that three of the six—Scott, Morris, and Massey—were supervisors, was denied by the Board as raising no substantial issues warranting review. On June 21, the United Steelworkers of America won the election 140 to 59.

Pursuing the accepted method for challenging such unit determinations, *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477 (1964), the Company refused to bargain with the Union. The Company's answer to the ensuing unfair labor practice complaint renewed the contention concerning the status of Scott, Morris, and Massey. In response to the General Counsel's Motion for Summary Judgment, the Company asserted the existence of newly discovered evidence concerning Scott's status and his activities on behalf of the Union. The Trial Examiner granted the Motion for Summary Judgment, concluding that the Company's evidence regarding Scott was not newly discovered and thus that the Regional Director's determination in the representation proceeding should be followed. The Board affirmed the Summary Judgment and adopted the Trial Examiner's conclusion that the Company had committed an unfair labor practice by its refusal to bargain.

Thereafter, the Company filed a Motion for Reconsideration with the Board, contending that the holding in *Pepsi-Cola Buffalo Bottling Co.* v. *N.L.R.B.*, 409 F.2d 676 (2d Cir. 1969), *cert. denied*, 396 U.S. 904 (1969), required the Board to make its own findings of fact regarding the status of Scott, Morris, and Massey. Noting its disagreement with the *Pepsi-Cola* rule, the Board denied the Motion, and comes to us seeking enforcement of its order to bargain.

I.

The Company's initial contention is that the inclusion of Scott, Morris, and Massey in the bargaining unit was improper because all three are supervisors within the meaning of the NLRA, 29 U.S.C. § 151 *et seq.* Under section 9

of the Act, only "employees" are properly includible in a bargaining unit, which provision combines with the section 2(3) definition of "employee" to exclude from the bargaining unit "any individual employed as a supervisor". Section 2(11) defines "supervisor" as

> "... any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, *if* in connection with the foregoing *the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.*" [Emphasis added.]

Since the definition is set forth in the disjunctive, it is generally agreed that the possession of any one of the listed powers is sufficient to confer "supervisory" status, *e.g., N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1173 (2d Cir. 1968); *N.L.R.B.* v. *Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1089 (8th Cir. 1969), as long as "such authority is not merely of a routine or clerical nature, but requires the use of independent judgment". *See, eg., Amalgamated Clothing Workers* v. *N.L.R.B.*, 420 F.2d 1296, 1300 (D.C. Cir. 1969).

Nevertheless, as Judge Woodbury stated in *N.L.R.B.* v. *Swift and Company*, 292 F.2d 561, 563 (1st Cir. 1961),

> "... the gradations of authority 'responsibly to direct' the work of others from that of general manager or other top executive to 'straw boss' are so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor'."

With that in mind, the Regional Director's determination

should be sustained if supported by substantial evidence.

The instant case presents one of those situations where the gradations of authority are particularly difficult to ascertain. The Company has approximately 250 employees in the unit found appropriate, some 22 of whom work in the Products Division. Within that Division there are two sections—one for plating and finishing, another for assembly and packaging—each with 10-12 men under the supervision of a foreman, both of whom are conceded to be "supervisors". It is within these 10-12 man sections that the present controversy arises. The Company contends that all four assistant foremen are also supervisors; the Regional Director found that only Zagrafos—who worked with 9 employees and had exercised supervisory powers on several occasions—was a supervisor, and that Morris, Massey, and Scott were not.

Morris and Massey are employed in the assembly and packaging section of the Products Division. Working with 2-4 others in separate groups, each performs routine supply and inspection functions in addition to the normal packaging work of the section. Both are paid somewhat more than their fellow workers, but substantially less than their foreman. Neither has ever exercised any of the powers specified in section 2(11).[1] Both refer any important decisions to their foreman, who makes the daily work assignments and checks the work of each of the men in the section, including Morris and Massey, at regular 10 minute intervals throughout the working day. Whatever responsibility these assistant foremen may have vis-a-vis their

[1] We accept the proposition that possession of section 2(11) authority is sufficient, and that such authority may be possessed even though it has not been exercised. *E.g.*, *N.L.R.B.* v. *Leland Gifford Co.*, 200 F.2d 620, 625 (1st Cir. 1952); *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, *supra* at 1173. However, in cases where possession of such authority is disputed, lack of exercise thereof is one factor in determining whether or not the authority is indeed possessed.

fellow workers, it is of a fairly routine nature; while some judgment is obviously required to determine what problems should be referred to the foreman, such judgments hardly suggest a finding of "supervisory" status. We are troubled by their attendance at bi-weekly "management" meetings but that one factor does not alter the substantial evidence that these men are not supervisors.

Scott presents more difficulty. He is specially trained to perform the critical plating function in the Products Division. During his seven months as an assistant foreman, he once recommended a raise for a fellow worker who soon thereafter received it, and he once prevailed on another employee—by threatened loss of job—not to leave work abruptly in the middle of the day. However, it does not strike us as unusual that the most skilled of three or four men in a shop would command respect from his co-workers and his foreman even though he possessed no "supervisory" powers. Moreover, the quality control work in which he engages concerns the products themselves and only indirectly reflects on his own work and that of the other employees; he is *not* charged with the responsibility of assessing their general capabilities. *Compare N.L.R.B.* v. *Metropolitan Life Insurance Co., supra* at 1174-1177. As with Morris and Massey, however, his frequent attendance at the "management" meetings lends credibility to the Company's contentions.

However, if "deference to expertise" and "substantial evidence" mean anything in this area of labor law, it is that courts should not substitute their judgment in the close cases. We have found only one recent decision where the Board's determination that certain men were not supervisors was reversed by a court of appeals. *N.L.R.B.* v. *Metropolitan Life Insurance Co., supra; compare Illinois State Journal-Register, Inc.* v. *N.L.R.B.*, 412 F.2d 37 (7th Cir. 1969); *N.L.R.B.* v. *Little Rock Downtowner, Inc., supra*

at 1089; *N.L.R.B.* v. *Swift and Company, supra* at 563. *Metropolitan Life* presented a much clearer case of "supervisory" status than do the inconclusive facts regarding Scott. We hold that the Regional Director's determination with regard to these three men is supported by substantial evidence.

Additionally, the Company contends that the Trial Examiner erred in refusing to consider its "new evidence" concerning the status and activities of Scott. We have just recently demonstrated our readiness to require trial examiners to hear such evidence when appropriately presented. *N.L.R.B.* v. *Maine Sugar Industries, Inc.* F.2d (1st Cir., May 15, 1970). However, because of the great potential for delay through this avenue, it is not unfair to require the offeror of such belated evidence to spell out what he has and why he could not have produced it at the appropriate time. The Company's first proffer merely stated that Scott had "admittedly withheld information . . . concerning his full responsibilities and authority as an assistant foreman", without in any way indicating what that information was. The Company's other offers of proof seem clearly to address matters within its knowledge at the representation hearing, with no explanation as to why such proof was not then offered. The Trial Examiner's refusal, therefore, was not error.

Since all three disputed workers are employees and thus were properly included in the bargaining unit, the Board's order is supported by substantial evidence and we have no occasion to concern ourselves with Scott's activities on behalf of the Union or with the issue raised in *N.L.R.B.* v. *Metropolitan Life Insurance Co., supra* at 1178.

II.

Our conclusion above does compel us to confront the issue set forth and discussed in *Pepsi-Cola Buffalo Bottling*, supra at 679-681: whether the National Labor Relations

Board must make its own findings of fact before it can conclude that a Company has committed an unfair labor practice by its admitted refusal to bargain. The Board in our case adhered to its "rule against relitigation", which provides in effect that the Board's denial of review of the Regional Director's findings of fact, after review of a summary of the evidence and the law prepared by the Company, is sufficient. 29 C.F.R. § 102.67(d)(f). The *Pepsi-Cola* decision struck down that part of the rule which allows the Board to find an unfair labor practice without making its own findings, which holding has apparently been embraced by the Fourth Circuit. *N.L.R.B.* v. *Clement-Blythe Companies*, 415 F.2d 78, 82 (4th Cir. 1969). More recently, however, *Pepsi-Cola* has been distinguished by another panel of the Second Circuit, with Judge Friendly expressing his doubts about the *Pepsi-Cola* decision. *N.L.R.B.* v. *Olson Bodies, Inc.*, 420 F.2d 1187, 1190 (2d Cir. 1970).[2] Having previously cited *Pepsi-Cola* in dicta as the existing law on this point—*N.L.R.B.* v. *Chelsea Clock Co.*, 411 F.2d 189, 192 (1st Cir. 1969)—we now must decide whether to follow that decision.

Viewing the problem as tabula rasa, there may be some merit to the propositions that discretionary review by the Board is not a sufficient guarantee of the exercise of the expertise attributed to the Board; that section 10(c) of the Act requires the Board to make its own determinations of fact in unfair labor practice cases, *see Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 492 (1951); and that Congressional rejection of proposals to delegate final authority to hearing examiners suggests a similar reluctance to delegate such authority to Regional Directors, *Pepsi-Cola Buffalo Bottlers, supra* at 681.

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[2] *Pepsi-Cola* has also been distinguished in *State Farm Mutual Auto Ins. Co.* v. *N.L.R.B.*, 413 F.2d 947 (7th Cir. 1969); *see also N.L.R.B.* v. *Process Corp.*, 412 F.2d 215, 217-218 (7th Cir. 1969).

But the slate was etched rather clearly, we think, when Congress amended section 3(b) of the Act, 28 U.S.C. § 153(b), in 1959. Section 3(b) begins by authorizing the Board to delegate to three or more of its members "any and all of the powers which it may exercise", and then, as amended, provides that "[t]he Board is also authorized to delegate to its regional directors its power under section [9 of the Act] . . . to determine the unit appropriate for the purposes of collective bargaining . . . except that the Board may review any action of the Regional Director . . ." Taken together, the two provisions reflect a Congressional decision to allow the Board—within the specified limits—to permit its delegates to act in its stead.

The Company contends that the section 3(b) amendment *on its face* confines the Regional Directors to the exercise of powers under section 9, and thus that a Regional Director's unit determination pursuant to section 9 can have no effect in a subsequent unfair labor practice proceeding under section 10. That argument, however, overlooks the well established principle that when the Board resolves an issue in a representation proceeding under its section 9 powers,[3] it is *not* required to reconsider the same issue and evidence in the ensuing unfair labor practice proceeding under section 10. *E.g., Pittsburgh Plate Glass Co.* v. *Labor Board*, 313 U.S. 146 (1941); *Amalgamated Clothing Workers* v. *N.L.R.B.*, 365 F.2d 898, 902-904 (D.C. Cir. 1966); *Riverside Press, Inc.* v. *N.L.R.B.*, 415 F.2d 281, 284 (5th Cir. 1969). Since the section 3(b) amendment delegated to the Regional Directors the Board's powers to make unit determinations in representation proceedings, we think it follows that the Director's determination—when not set aside by the Board—is entitled to the same

[3] The Board may be called on to make such determinations, either after accepting a Request for Review or after transfer of the case by the Regional Director. *See* 29 C.F.R. § 102.67.

weight in the subsequent proceeding that the Board's own determination would have been accorded.

The legislative history behind the section 3(b) amendment, while not extensive, confirms the breadth of the intended delegation. Senator Goldwater, a member of the Conference Committee which had inserted this amendment which had not appeared in the bills passed by the House and Senate, offered the most complete explanation for the amendment. The purpose was "to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination." It was made clear that the regional directors would be "required to follow the lawful rules, regulations, procedures, and precedents of the Board and to act in all respects as the Board itself would act." As one safeguard against possible abuse of the delegated power, the Board was assured the right of continuous supervision over its delegates, so that the Board could "refuse to delegate authority to handle all or any part of the proceedings in contested representation cases." 2 NLRB Legislative History of the Labor-Management and Disclosure Act of 1959, 1856(2) (1959) (Remarks of Senator Goldwater).[4]

We draw two conclusions from the amendment and this history. First, the primary purpose behind the amendment was the desire to expedite the final disposition of a part of the Board's caseload. The Board delegated its authority

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[4] We note also that both Congressman Griffin—co-sponsor of the House bill and an active advocate for the Conference version which eventually became law—and Congressman Barden—Chairman of the House Committee on Education and Labor whose earlier bills, H.R. 4473 and 4474, contained the first mention of the section 3(b) amendment—inserted brief explanations of the section 3(b) amendment about ten days prior to final passage. 2 NLRB Legislative History, 1811(3), 1812(3). Both focused primary attention on the Board's ability to require adherence by its Regional Directors to its rules and precedents. Were the Board additionally expected to make its own findings, there would be no reason for this concern to be voiced at all.

over elections and certifications, and, by its "rule against relitigation", decided that all issues finally resolved in such proceedings need not be redetermined in the ensuing unfair labor practice proceeding. Thus, while the Company's interpretation—based on *Pepsi-Cola*—would expedite only elections and certifications but not the disposition of the issues resolved therein, the Board's interpretation makes it unnecessary to redetermine each of those issues, thereby effectuating the Congressional purpose more completely.

Secondly, the section 3(b) delegation of authority to the Regional Directors suggests to us a Congressional judgment that the Regional Directors have an expertise concerning unit determinations sufficiently comparable to the Board's expertise that such determinations may be left primarily to the Regional Directors, subject to the Board's discretionary review. Given this determination that the Board's expertise need only be fully brought to bear on those unit determinations which the Board chooses to review, no unfairness arises from the fact that the Regional Director's determination, after denial of review by the Board, is adopted by the Trial Examiner and the Board in the ensuing unfair labor practice proceeding.

Furthermore, it is important to recognize that Congress did build in a second safeguard against possible abuse by the Regional Directors of the delegated powers. 2 NLRB Legislative History, 1811(3) (Remarks of Congressman Griffin); *ibid.*, 1812(3) (Remarks of Congressman Barden). In both the representation proceeding and the unfair labor practice proceeding, the "ultimate decision" remains with the Board, just as much as in *N.L.R.B.* v. *Duval Jewelry Co.*, 357 U.S. 1, 8 (1957), where the Court upheld the Board's delegation of some of its authority to an agent because "ultimate decisions on the merits of all the issues coming before him is left to the Board", although recourse to the

Board there, as here, was solely a matter of the Board's discretion.

The Company makes much of the argument that the Board has never reviewed the actual evidentiary record in this case. However, that statement is misleading, for the Board did review the evidence as summarized by the Company in its Request for Review, 29 C.F.R. § 102.67(d), and on that basis it concluded that the Company's claims regarding the status of the three assistant foremen presented no substantial issues warranting review. It is difficult to see in what respect a review of the actual record would have added to the Board's comprehension of the Company's contentions.[5] Of course there is nothing to stop the Board from itself reconsidering the evidence adduced in the representation proceeding which is before it in the unfair labor practice proceeding. *See* 29 C.F.R. § 102.48(b).

The Fourth Circuit, embracing the *Pepsi-Cola* rule, was most persuaded by the absence of any findings by the Board for the courts of appeals to review. *N.L.R.B.* v. *Clement-Blythe Companies*, 415 F.2d at 81-82. However, both Senator Goldwater's remarks and the Board's own rules make clear that the Regional Director is required to follow the same rules as the Board, so that findings of fact by him must be forthcoming. 29 C.F.R. § 102.67(b). Moreover, the Board's rules make clear that the Regional Director's determinations, if adopted by the trial examiner in the unfair labor practice proceeding, will accompany the case first to the Board—29 C.F.R. § 102.45(a)—and then to the appropriate court of appeals. 29 C.F.R. § 101.14; 29 U.S.C.

[5] The adequacy of this procedure is illustrated by the record before us. The Request for Review contained a complete summary of the relevant evidence, with page references to the transcript of the hearing, as well as a fully documented legal memorandum. In effect, the procedure enables the protestant to marshal its facts and law relevant to the point in issue. If the Board chooses to deny review, its action is one informed by a focused presentation. It cannot fairly be called rubber stamping, with the blind automaticity which the term connotes.

§ 10(d). In the case presently before us, the Regional Director's findings of fact which had been adopted by the trial examiner and by the Board were as complete and "reviewable" as any we have received from the Board. We therefore reject the notion that either section 10(c) of the Act or the Administrative Procedure Act, 5 U.S.C. § 557, is offended by the fact that we review the Regional Director's findings which have been adopted by the Board.

The Second Circuit's recent effort—*N.L.R.B.* v. *Olson Bodies, Inc.*, 420 F.2d at 1190—to confine the *Pepsi-Cola* holding seems to us an unsatisfactory compromise: actual Board review and determination is only required where the issue "is difficult and requires a fine-drawn balancing of facts and law". We shrink from the prospect of attempting such characterizations; in the case before us involving the issue of "supervisory" status, the question seemed difficult only with regard to one of the three assistant foremen. Perhaps the Board determined, in its expertise, that the issues here presented were *not* difficult ones when it concluded that the Company's contentions presented no issue warranting review. Are we now to tell the Board that we think it was wrong with regard to one of the three men, that it must review his status because we think the question a close one? Surely that approach would frustrate rather than foster the expeditious disposition of cases intended by Congress. We conclude that the Board's expertise was brought to bear to the extent required by section 3(d) when it denied review of the Regional Director's determination.

We therefore part company with both recent decisions of the Second Circuit, and hold that the procedure followed by the Board in this case satisfies the requirements of the National Labor Relations Act, the Administrative Procedure Act, and the demands of procedural fairness.

The Company's final contention is that it should be

relieved of its duty to bargain because of a substantial turnover of its employees since the election. The Company's unfair labor practice, its refusal to bargain, having caused this delay since election, the Board's refusal to set aside the election is sustained. *Cf. N.L.R.B.* v. *Better Val-U Stores of Mansfield, Inc.*, 401 F.2d 491, 494-495 (2d Cir. 1968).

The petition for enforcement is granted.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

DECISION AND ORDER

On January 28, 1969, Trial Examiner Paul E. Weil issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and the Charging Party filed exceptions to the Trial Examiner's Decision and Respondent filed a supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations[1] of the Trial Examiner.

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[1] In its exceptions to the Trial Examiner's Decision, the Charging Party requests an affirmative bargaining order, without any further request that the Respondent bargain with it, and a monetary remedy to, *inter alia*, make the employees and it whole for losses they may have suffered as a result of the Respondent's unlawful refusal to bargain. We deem it inappropriate in this case to depart from our existing policy with respect to remedial orders in cases involving violations of Section 8(a)(5), and therefore deny the said request. See *Monroe Auto Equipment Company*, 164 NLRB No. 144, footnote 1.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Magnesium Casting Company, Hyde Park, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C. April 17, 1969.

FRANK W. MCCULLOCH, Chairman
JOHN H. FANNING, Member
SAM ZAGORIA, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Case No. 1-CA-6498

MAGNESIUM CASTING CO.
and
UNITED STEELWORKERS OF AMERICA,
AFL-CIO

TRIAL EXAMINER'S DECISION

Statement of the Case

The Representation Proceeding[1]

Upon a petition filed under Section 9(c) of the National Labor Relations Act (29 U.S.C.A. 159(c)) by United States Steelworkers of America, AFL-CIO, hereinafter called the Charging Party, a hearing was held by the Regional Director for Region 1 of the Board at which the employer appeared specially arguing that the hearing should not be conducted because of the pendency of a charge filed by it against the Union alleging a violation of Section 8(b) (1) (A). The Motion was denied and the hearing was completed.

The Regional Director consequently issued a decision directing an election in a unit consisting of all production and maintenance employees of the employer at its Hyde Park, Massachusetts plant including the records keeping

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[1] Administrative or official notice is taken of the record in the representation proceeding Case No. 1-RC19973, as the term "record" is defined in Section 102.68 and 102.69 (f) of the Board's Rules and Regulations Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB No. 81 enfd. 388 F. 2d 683 (C.A. 4, 1968).

department employees, shipping and receiving employees and the truckdriver but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act. The Decision specifically dealt with a classification of alleged supervisors known as assistant foremen, six of whom were found to be employees and the seventh to be a supervisor and excluded from the unit.

On May 31, 1968, the Respondent filed a request for review pursuant to Section 102.67 of the Board's Rules and Regulations contending that three of the assistant foremen found to be employees are in fact supervisors and the Union filed its statement in opposition to the request for review. On June 18 the Board denied the request for review on the ground that it raised no substantial issues warranting review. On June 17 Respondent filed a Motion to Withdraw Decision and Direction of Election and Dismiss Petition contending that by furnishing an election eligibility list to the Union pursuant to the *Excelsior* rule.[2] Respondent had been required to lend assistance to the Union which necessarily would affect the results of the election. Respondent also contended that the rule was improperly promulgated and contrary to the requirements of the Administrative Procedures Act.

The Motion was denied on June 19 by the Regional Director on the ground that the *Wyman-Gordon*[3] decision of the First Circuit upon which Respondent rested its Motion does not provide for retroactive application. The election was conducted on June 21, 1968, and Respondents moved the District Court for the District of Massachusetts for a ruling enjoining the certification of the results of the election on the same grounds on which its motion to the Regional Director rested. The United States District Court

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[2] *Excelsior Underwear, Inc.*, 156 NLRB 1236.

[3] *Wyman-Gordon Company et al.* v. *N.L.R.B.*, 379 F. 2d 394 (1968).

granted the rule sought by Respondent and its action was summarily reversed by the United States Court of Appeals for the First Circuit.[4]

On June 28 the Respondent filed objections to conduct affecting the results of the election, again raising the "*Excelsior*" and the "*Wyman-Gordon*" issues and further alleging that prior to the election the Union informed employees that if they did not sign an authorization card they would have to pay $75 initiation fee to the Union. The objections were overruled and the United Steelworkers of America was certified as the representative of the employees on October 11, 1968. Respondent by telegram to the Board excepted to the Supplemental Decision and Certification on the ground that the employer proposed to seek a writ of certiorari before the United States Supreme Court to the decision of the First Circuit Court of Appeals in which the District Court injunction was set aside. This exception was treated as a request for review and denied on the ground that it raised no substantial issues warranting review.

The Complaint Case

On October 22, 1968, the Union filed the unfair labor practice charge involved in the instant case, alleging that the employer refused to bargain with the Union as the exclusive collective-bargaining representative of Respondent's employees in spite of the certification. On November 8, 1968, the Regional Director for Region 1 issued a Complaint and Notice of Hearing alleging that Respondent had committed unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act by refusing to bargain with the Union upon request. On November 18 Respondent filed a Motion for a Bill of Particulars and on the 19th an Answer to the Complaint. The General Counsel filed an Opposition to the Motion for a Bill of Par-

[4] 69 LRRM 2235.

ticulars giving certain additional particulars. On December 5 a Motion for Summary Judgment dated December 3 was filed with the Chief Trial Examiner by the Regional Director. Trial Examiner Schneider on December 6 issued an Order to Show Cause on the Motion for Summary Judgment to which Respondent replied on January 2, 1969.

Ruling on Motion for Summary Judgment

In its Opposition to the Motion for Summary Judgment the Respondent urges that the General Counsel's Motion should be denied for a number of reasons which may be summarized as follows:

1. The General Counsel omitted part of the background of the case notably the grounds on which the Regional Director denied the employer's Motion to Withdraw Decision and Direction of Election and Dismiss the Petition.
2. The complaint is premature since the Respondent has filed a Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit in its injunction proceeding and further the Supreme Court has agreed to review the *Wyman-Gordon* Decision wherefore the Board should not proceed with this matter until both actions by the Supreme Court have been consummated.
3. The General Counsel should be estopped from its motion by the action of the General Counsel in granting certain assurances to Respondent that it is entitled to a full hearing.
4. The Decision of the First Circuit Court of Appeals in *Wyman-Gordon* constitutes newly-discovered evidence.
5. The representation election was not conducted according to rules promulgated in accordance with *Section 6* of the Act and is therefore invalid.
6. The appropriate unit should have included as supervisors the assistant foremen.

7. Newly-discovered evidence concerning the supervisory status of one Scott and his actions on behalf of the Union necessitate a full hearing.

Finally Respondent moved that the Trial Examiner postpone the hearing in the instant case until the Supreme Court acts on the petition for writ of certiorari and also renders its decision in the *Wyman-Gordon* case.

With respect to the first issue raised by Respondent concerning the omission of facts by the General Counsel, as I stated above, administrative notice has been taken of the record in the representation proceeding which includes the employer's Motion to Withdraw the Decision and Direction of Election, the denial by the Regional Director, the Request for Review and the Board's denial thereof. Accordingly, the facts allegedly omitted by the General Counsel are before the Trial Examiner and the Board.

With regard to Respondent's argument that the complaint issued by the General Counsel is premature, to the extent that Respondent's argument is predicated on the litigation of the validity of the *Excelsior* rule in the *Wyman-Gordon* case this matter has already been considered by the Board in the representation proceeding and will not be reconsidered herein. To the extent that the argument is predicated on the filing of a petition for certiorari in the injunction proceeding Respondent cites no authority for the proposition that the Board's processes should be held up pending a determination by the Supreme Court of the United States whether to grant certiorari and presumably if certiorari is granted the period of time necessary for the Supreme Court to issue its decision. As the United States Court of Appeals for the First Circuit stated in its decision in Magnesium Casting Co., F.2d (September 10, 1968) "labor matters should proceed promptly." I am not convinced by Respondent's argument especially in view of the fact that Respondent's petition for a writ of certiorari

does not necessarily speak to the validity of the election.

Regarding Respondent's argument that the General Counsel should be estopped by alleged assurances by General Counsel Ordman that Respondent is entitled to a full and complete hearing, the alleged assurances are contained in a letter which recites the provisions of Section 10(b) of the National Labor Relations Act that any person charged with the commission of an unfair labor practice must be served with a complaint stating the charges and a notice of hearing. The notice of hearing sets the time and place of the hearing and advises a Respondent that it is entitled to participate fully and present whatever evidence it has in support of its position to a duly designated trial examiner.

The General Counsel's letter goes on to state "the Act also provides that such proceedings 'shall so far as practicable be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States....'" The Board and the courts have many times had occasion to consider whether the language quoted above constitutes a requirement that a hearing be conducted in cases such as this. A recent case in which this issue was raised is *El-Ge Potato Chip Company, Inc.*, 173 NLRB No. 19 in which the Trial Examiner quoted from the Board decision in *Harry T. Campbell Sons' Corporation*, 164 NLRB No. 36 fn. 9 "where there are no unresolved issues requiring an evidential hearing the motion of the General Counsel for summary judgment on the pleadings is normally granted. There is no absolute right to a hearing." The United States Court of Appeals for the Fifth Circuit put it succinctly in *NLRB* v. *Air Control Window Products of St. Petersburg*, 335 F. 2d 245, 249 (C.A. 5, 1964): "If there is nothing to hear, then a hearing is a senseless and useless formality."

The letter of the General Counsel does not constitute a waiver but on the contrary it refers to language which the Board and the courts have so many times construed that the construction must be read together with language. I reject the argument.

Respondent contends that the decision of the court in the *Wyman-Gordon* case and the "imminent decision of the United States Supreme Court in the same case" constitutes newly discovered evidence. Respondent does not indicate in what regard it considers that the decisions of courts constitute evidence nor, other than asserting the fact, do they argue so. However whether viewed as evidence or legal authority the contention was raised before the Board in the representation proceeding and rejected. The same must be said of Respondent's contention that the representation election was not conducted according to rules promulgated in accordance with Section 6 of the Act and is invalid. Respondent's reference therein is to the fact that the *Wyman-Gordon* decision found the *"Excelsior"* rule invalid because it was not published as a rule but laid down in a decision. Equally the contention that the appropriate unit should have excluded the assistant foreman was litigated before the Board in the representation proceeding. In the absence of newly discovered or previously unavailable evidence or special circumstances it is established Board policy not to permit litigation before a trial examiner in an unfair labor practice case of issues which were or could have been litigated in a prior representation proceeding.[5] Respondent does not assert that any special circumstances exist other than its characterization of the decisional authorities in the *Wyman-Gordon* case as evidence and a contention that there is newly discovered evidence concerning

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[5] *Howard Johnson Company*, 164 NLRB No. 121; *Winfield Manufacturing Co., Inc.*, 173 NLRB No. 103; *El-Ge Potato Chip Company, Inc., supra*, and all the cases therein cited on this point.

the supervisory status of Ivory Scott, one of the assistant foremen.

In its Reply Respondent submits that Ivory Scott "admittedly withheld information in the representation hearing concerning his full responsibilities and authority as an assistant foreman for Respondent and that Scott solicited authorization cards for the Union and participated in its organizational drive." The only construction that I can make of Respondent's Reply is that it views Scott's "admission" as newly discovered evidence, however Respondent furnishes no support for its contention other than offering to prove in a full hearing that Scott had supervisory authority and did various acts consistent thereto, each of which particulars was litigated and considered in the hearing in the representation case. To what extent such evidence is new is impossible to determine other than Scott's admission which presumably came after the hearing and of which we know nothing. The evidence which Respondent offers to adduce is evidence which Respondent must have had prior to the representation case hearing. With regard to the fact that Scott solicited authorization cards and participated in the Union's organizational drive, inasmuch as he was found to be an employee by the Board no relevance is given this fact. New evidence on an irrelevant issue is certainly not grounds for a hearing. The issue as to the inclusion of the assistant supervisors was vigorously contested at the representation hearing. No reason is given for failure to offer evidence such as Respondent recites at that time, if in fact it was not offered. There is no showing that the testimony was not then available or that it could not have been obtained and adduced with the exercise of reasonable diligence. Under these circumstances reopening the representation hearing at this stage of the

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[6] *Goldspot Dairy, Inc.*, 173 NLRB No. 151 Cf., *Ideal Laundry and Dry Cleaning Co.*, 330 F. 2d 712 (C.A. 10, 1964) therein cited.

proceeding is not warranted.[6] I find the Respondent's contention unsubstantiated.

Finally Respondent moves to postpone the hearing until the decision of the Supreme Court on its petition for writ of certiorari. Inasmuch as I have found that no hearing is necessitated herein the Motion must be denied.

There being no unresolved issues requiring an evidential hearing the Motion of the General Counsel for summary Judgment is granted and I hereby make the following:

Findings and Conclusions

I. Jurisdiction and Labor Organization

It is admitted in the answer and therefore found (1) that the Respondent is engaged in commerce within the meaning of 2(6) and (7) of the Act and (2) that the Union is a labor organization within the meaning of the Act.

II. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The Unit

The following employees at the Respondent's Hyde Park, Massachusetts plant constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed at Respondent's Hyde Park, Massachusetts plant including the records keeping department employees, shipping and receiving employees and the truckdriver exclusive of office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act.

2. The Certification

On June 21, 1968, the majority of the employees in the unit described above by a secret ballot election conducted under the supervision of the Regional Director for the First Region of the Board designated the Union as the

representative for the purpose of collective bargaining with Respondent, and on October 11, 1968, the Regional Director for the First Region certified the Union as the collective-bargaining representative of the employees in said unit and the Union continues to be such representative.

B. *The Request to Bargain and the Respondent's Refusal*

On or about October 22, 1968, the Union requested Respondent to bargain collectively in respect to rates of pay, wages, hours of employment or other conditions of employment with the Union as the exclusive representative of all the employees of Respondent in the unit described above.[7]

At all times since on or about October 22, 1968, the Respondent has refused to recognize and bargain collectively with the Union as exclusive collective-bargaining representative of all employees in said unit.

Accordingly I find that Respondent has refused to bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit and that by such refusal the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

III. The Effect of the Unfair Practices Upon Commerce

The acts of the Respondent as set forth in Section II above occurring in connection with its operations as found in Section I above have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondent has engaged in un-

[7] Although Respondent in its answer denied that the Union requested Respondent to bargain it has at no point in the proceeding controverted this fact and its answer and particularly its Reply to the Order to Show Cause make it ultimately clear that it has and continues to refuse to bargain.

fair labor practices within the meaning of Section 8(a)(5) and (1) of the Act I shall recommend that it cease and desist therefrom and upon request bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and if an understanding is reached embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their collective-bargaining agent for the period provided by law I shall recommend that the initial year of certification be construed as beginning on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the sppropriate unit. See *Pacific Intermountain Express Company*, 173 NLRB No. 75; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 enfd. 328 F. 2d 600 (C.A. 5) cert. denied 379 U.S. 817.

Conclusions of Law

1. Magnesium Casting Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees of Magnesium Casting Co. employed at its Hyde Park, Massachusetts plant including the record keeping department employees, shipping and receiving employees, and the truck-driver exclusive of its office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since October 22, 1968, the above-named labor organization has been certified as the exclusive representative of all the employees in the aforesaid appropriate unit for

the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about Octiber 22 and at all times since to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain Respondent has interfered with, restrained, and coerced and is interfering with, restraining and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Magnesium Casting Co., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours and other terms and conditions of employment with United Steelworkers of America, AFL-CIO as the exclusive bargaining representative of its employees in the following appropriate units.

> All production and maintenance employees employed at Respondent's Hyde Park, Massachusetts plant including the records keeping department employees, shipping and receiving employees and the truckdriver exclusive of office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Upon request bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, hours and other terms and conditions of employment and if an understanding is reached embody such understanding in a signed agreement.

(b) Post at its Hyde Park, Massachusetts place of business copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representatives shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify said Regional Director for Region 1 in writing within 20 days from receipt of this Recommended Order what steps the Respondent has taken to comply therewith.[9]

Dated at Washington, D.C. January 28, 1969

(s) PAUL E. WEIL,
Trial Examiner

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[8] In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[9] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 1, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with UNITED STEELWORKERS OF AMERICA, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL upon request bargain with the above-named union as the exclusive representative of all employees in the bargaining unit described below with respect to wages, hours and other terms and conditions of employment and if an understanding is reached embody such understanding in a signed agreement.

The bargaining unit is:

All production and maintenance employees employed at our Hyde Park, Massachusetts plant including the records keeping department employees, shipping and receiving employees and the truckdriver exclusive of office clerical employees, professional employees,

guards and all supervisors as defined in Section 2(11) of the Act.

MAGNESIUM CASTING CO.
(Employer)

Dated By
(Representative) *(Title)*

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, John F. Kennedy Federal Bldg., 20th Floor, Cambridge & New Sudbury Streets, Boston, Mass. 02203 (Tel. No. 617-223-3300).

APPENDIX D

MOTION FOR RECONSIDERATION

Comes now Magnesium Casting Co., Respondent in the above-entitled matter, and pursuant to Section 102.48(d) of the Board's Rules and Regulations moves the Board reconsider its Decision and Order, dated April 17, 1969, for the reason that the Board denied, on June 18, 1968, the Employer's Request for Review, dated May 31, 1968, subsequent to the representation hearing on the ground that it raised "no substantial issues warranting review" (see Ex. B and C. attached to Motion for Summary Judgment) and later granted General Counsel's Motion for Summary Judgment in the above-entitled case, such conduct by the Board being in violation of Section 29 U.S.C. Sec. 160(c), wherein Congress stated that the Board must rule whether a litigant has committed an unfair labor practice. Respondent urges that the Board's failure to review the record before the Regional Director in order to make its own decision as to whether the Regional Director's decision was right violates the Act, as held in *Pepsi-Cola Buffalo Btlg. Co.* v. *NLRB*, (USCA 2, 1967) 70 LRRM 3185, a case decided on March 25, 1969, following submission of Brief in the immediate case.

Crucial to the merits of the unfair labor practice case is the determination of the supervisory capacity of employee Ivory Scott, called an assistant foreman, who actively solicited authorization cards, as an agent for the union, and submitted these cards to support the union's showing of interest in its petition for a representation election, the results of which form the basis for the union's claim to be the employees' duly chosen exclusive collective bargaining agent. Furthermore, Scott actively campaigned and solicited votes for the union as an agent of the union, behavior which violates Section 8(b)(1)(A)

of the Act. The total behavior of Scott, Respondent asserts, required the Regional Director to dismiss the petition since the showing of interest was tainted and the activity of Scott constituted an unfair labor practice, as alleged by Respondent in its charge in Case No. 1-CB-1362.

Following the filing by the union of a petition for representation, a hearing was held at which time the supervisory authority of a number of employees, including Ivory Scott, was contested. Simultaneously a charge filed by Respondent was pending in Case No. 1-CB-1362, alleging the union violated 8(b)(1)(A) by having Scott act as its agent in soliciting authorization cards, used to support the union's petition, and engaging in other conduct in support of the union tending to restrain and coerce employees in the exercise of their Section 7 rights. On the basis of the evidence adduced at the hearing, the Regional Director concluded that Scott, among others, was not a supervisor and directed an election.

The Request for Review filed by the Respondent was denied on the ground that it raised "no substantial issues warranting review." Following an election in which the union received a majority, Respondent refused to bargain and raised as part of its defense the supervisory authority of Ivory Scott and the acts of Scott as agent for the union. The General Counsel moved for summary judgment, which was granted by the Trial Examiner, who refused to review the Regional Director's Decision, stating (Trial Examiner's Decision p. 5, l. 17-23):

> Equally the contention that the appropriate unit should have excluded the assistant foremen was litigated before the Board in the representation proceeding. In the absence of newly discovered or previously unavailable evidence or special circumstances it is established Board policy not to permit litiga-

> tion before a trial examiner in an unfair labor practice case of issues which were or could have been litigated in a prior representation proceeding.

That the Trial Examiner relied on the findings on the Regional Director is clear (Trial Examiner's Decision p. 5, l. 42-44):

> With regard to the fact that Scott solicited authorization cards and participated in the union organizational drive, inasmuch as he was found to be an employee by the Board no relevance is given this fact.

The Trial Examiner's statement that the Board found Scott to be a supervisor is clearly erroneous, since the Board did *not* decide the issue, but in fact merely refused to review the record and to make its own decision. The Trial Examiner and the Board also refused to review the record independently of the Regional Director's conclusions on this issue, as is evident from the failure of both to discuss the merits of the issue of Scott's supervisory authority.

Respondent urges that the standards for review in Section 102.67 (c) of the Board's Rules and Regulations run contrary to the intent of Congress since they prevent Respondent from having the Board, as Congress specifically designated, make the final decision in unfair labor practice cases. The tests for the granting of review are narrow and confining and in most cases where a question of law or policy is not an issue, review will be granted solely on a finding by the Board, based on the Request for Review which must be a "self-contained" document enabling the Board to rule without the necessity of recourse to the record (Section 102.67(d)), that the Regional Director's decision was "clearly erroneous" *and* there are "compelling reasons" for review. By seeking to avoid "relitigation" of matters, the Board is shirking its responsibility to decide unfair labor practice. See 29 U.S.C.

Sec. 160 (c); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

Circuit Judge Kaufman, writing the Opinion in *Pepsi-Cola Buffalo Btlg. Co.* v. *NLRB, supra*, stated at 3187

> In an unfair practice proceeding, the Board cannot completely abdicate its responsibility to a regional director, a functionary whose appointment is not even subject to consideration by the Senate, as are those of the Board members. Moreover, the Board's experience is particularly relevant and desirable in deciding complex issues relating to the appropriate bargaining unit before the potent sanctions arising from the finding of an unfair labor practice are invoked. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 20 LRRM 2115 (1947); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 19 LRRM 2397 (1947).

On the basis of the above discussion, Respondent requests the Board to review the Decision of the Regional Director and to make its own decision as to whether the Regional Director's determination was correct. Respondent also reserves the defenses raised in its original Exceptions and Brief in Support of Exceptions, despite the limited nature of this Motion for Reconsideration.

Respectfully submitted,
MAGNESIUM CASTING COMPANY
By its attorneys
STONEMAN AND CHANDLER
(s) LOUIS CHANDLER
(s) JEROME H. SOMERS

Dated at Boston, Massachusetts
April 29, 1969
Post Office Address:
79 Milk Street
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(CERTIFICATE OF SERVICE)

APPENDIX E

ORDER DENYING MOTION

On January 28, 1969, Trial Examiner Paul E. Weil of the National Labor Relations Board issued his Decision in the above-entitled proceeding. The Trial Examiner took administrative notice of the record in a related representation proceeding, Case 1-RC-9973, in which the Regional Director, in his Decision and Direction of Election, had found, *inter alia,* that Ivory Scott was not a supervisor; the Board had denied review of the Regional Director's finding and the Regional Director had certified the Union. After consideration of the record in the instant case, the Trial Examiner concluded that there were no unresolved issues requiring an evidential hearing. He, therefore, granted the General Counsel's Motion for Summary Judgment, found that the Respondent had refused to bargain with the certified Union in violation of Section 8(a)(5) and (1) of the Act, and recommended that it cease and desist therefrom and bargain with the Union. The Board, on April 17, 1969, issued a Decision and Order [1] in which it adopted the Trial Examiner's findings, conclusions and recommendations as contained in his Decision, and ordered that the Respondent take the action set forth in the Trial Examiner's Recommended Order.

Thereafter, on May 1, 1969, the Respondent filed a motion for reconsideration of the Board's Decision and Order, contending that the Board's failure to review the record before the Regional Director in Case 1-RC-9973 for the purpose of making its own decision that Ivory Scott was not a supervisor is in violation of the National Labor Relations Act, as held by the United States Court of Appeals for the Second Circuit in *Pepsi-Cola Buffalo Bottling*

[1] 175 NLRB No. 68.

Co. v. *N.L.R.B.*, —— F. 2d ——, (March 25, 1969), petition for rehearing denied May 15, 1969. The Respondent requests that the Board independently review the Regional Director's decision and determine whether or not the Regional Director's decision that Ivory Scott was not a supervisor was correct.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Respondent's motion for reconsideration be, and it hereby is, denied as lacking merit.[2]

Dated, Washington, D. C., August 11, 1969.

By direction of the Board:

(s) GEORGE A. LEET
Associate Executive Secretary

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[2] With due deference to the Second Circuit's decision in *Pepsi-Cola Buffalo Bottling Company* v. *N.L.R.B.*, supra, the Board disagrees therewith and adheres to its previous position until such time as the Supreme Court of the United States rules otherwise.

APPENDIX F

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151 et seq.) are as follows:

Sec. 3 (b) The Board is authorized to delegate to any group of three of more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. . . . .

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 10 (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear

argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. . . . .

Sec. 10 (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the

court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Sec. 10 (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the

Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

The relevant provision of the Board's Rules and Regulations is 29 C.F.R. § 102.67. It provides in part:

Sec. 102.67 *Proceedings before the regional director; further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to Board; proceedings before the Board; Board action.*—(a) The regional director may proceed, either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. Any party desiring to submit a brief to the regional director shall file the original and one copy thereof, which may be a typed carbon copy, within 7 days after the close of the hearing: *Provided, however,* That prior to the close of the hearing and for good cause, the hearing officer may grant an extension of time not to exceed an additional 14 days. Copies thereof shall be served simultaneously on all other parties to the proceeding. Requests for additional time in which to file a brief under authority of this section not addressed to the hearing officer during the hearing shall be made to the regional director, in writing, and copies thereof shall immediately be served on the other parties. Requests for extension of time shall be received not later than 3 days before the date such briefs are due in the regional office. No reply brief may be filed except upon special leave of the regional director.

(b) A decision by the regional director upon the record

shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however,* That within 10 days after service thereof any party may file eight copies of a request for review with the Board in Washington, D.C. Such request shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies shall not be filed and if submitted will not be accepted. Copies thereof shall be served simultaneously on all other parties to the proceeding and the regional director in the same manner used to file with the Board, except that if personal service is made upon the Board, service upon the other parties shall be made in such manner as would reasonably insure receipt by the other parties within 3 days after the date of service upon the Board. A statement of such service shall be filed simultaneously with the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of any action taken or directed by the regional director: *Provided, however,* That the regional director, in the absence of a waiver, may issue a notice of election but shall not conduct any election or open and count any challenged ballots until the Board has ruled upon any request for review which may be filed.

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling

made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

* * *

(f) The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

The relevant provisions of the Administrative Procedure Act is 5 U.S.C. 557(c), which provides in part:

All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record. . . .